

Tran (Migration) [2022] AATA 1286 (18 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Van Thu Thi Tran
VISA APPLICANT:	Mr Khac Hop Nguyen
REPRESENTATIVE:	Ms Jennifer Nguyen (MARN: 2117717)
CASE NUMBER:	1835867
DIBP REFERENCE(S):	BCC2018/1424089
MEMBER:	Stephen Conwell
DATE:	18 April 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 18 April 2022 at 1:58pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – sponsor’s fifth marriage – joint travel – money transfers to assist the applicant’s business – limited evidence of pooling financial resources – sponsor’s temporary household registration in Vietnam – limited evidence of shared household – untranslated evidence of communication – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 November 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 March 2018 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant (applicant) did not satisfy cl.309.211 because there was insufficient evidence that the parties were in a spousal relationship as set out in s.5F.
4. The review applicant (sponsor) provided a copy of the delegate's decision to the Tribunal for the purposes of the review.
5. The hearing was held during the coronavirus (COVID-19) pandemic. Having regard to the nature of the review, and the objectives of the Tribunal to provide a mechanism of review that is just, fair, economical and quick, the Tribunal determined that it was appropriate that this review be conducted by way of video hearing via Microsoft Teams. The Tribunal exercised its discretion to hold the hearing by video. The parties raised no objections as to conducting the hearing by video.
6. The sponsor and applicant participated in the hearing by video on 12 April 2022 to give evidence and present arguments. There were no witnesses who attended the hearing. The hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicant was represented in relation to the review by his registered migration agent (representative). The representative and interpreter attended the Tribunal hearing by video.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of s.5F(2) at the time of application and the time of decision.

10. *Background to the application*

11. Based upon the decision record, the other documentary evidence and oral testimony before the Tribunal, the applicant's immigration and the parties' relationship history can be summarised as follows:
 - the sponsor is a 49-year-old Australian citizen. She is divorced, having been married on four previous occasions. She is presently unemployed and has been so since the birth of her daughter some 15 years ago. She has been in receipt of unemployment benefits since that time. Her daughter lives with her and they share a rental home in Melbourne with another woman and her own daughter. The sponsor's mother is also in Melbourne. Her father and four siblings live in Vietnam. Two other siblings live in Germany.

- the applicant is a 47-year-old male and a citizen of Vietnam. He has never been married and has no children. Both his parents are deceased, his mother dying last year. He has two older siblings who both live in Vietnam. The applicant has a small business through which he repairs and sells electronic equipment, such as speakers and sound amplifiers, from his home.
- the parties first came to meet during the sponsor's visit to Vietnam in October 2015 from which a friendship developed;
- the sponsor returned to Vietnam in May 2016 to enter into her fourth marriage, with Mr PHAN, Hoang Vu. They married on 20 May 2016, however, according to the applicant's relationship statement dated 3 March 2022, the relationship deteriorated rapidly and the sponsor and her fourth husband had very little contact with each other from September 2016 until their eventual divorce on 11 April 2017;
- on 18 September 2016 the sponsor returned to Vietnam for two months and she and the applicant socialised together. It is claimed that the parties resided together at the applicant's home, which he shared with his mother. The sponsor confided in the applicant that her fourth marriage was breaking down and her relationship with the applicant grew stronger. The sponsor returned to Australia on 26 November 2016;
- on 19 January 2017 the sponsor returned to Vietnam for a further two months. The parties continued to develop their relationship and the applicant proposed to the sponsor before she returned to Australia on 15 March 2017. On 4 July 2017 the sponsor returned to Vietnam for her marriage to the applicant. The parties registered their marriage on 31 July 2017. A church ceremony took place on 5 August 2017, with a wedding function on the next day, 6 August 2017, in the presence of approximately 270 guests, almost entirely family and friends of the applicant. The couple honeymooned in Thailand in August 2017, after which they returned to live in the applicant's home until the sponsor returned to Australia on 18 September 2017;
- on 17 January 2018 the sponsor returned to Vietnam for a further two months. During this visit the parties enjoyed a short holiday in South Korea. The sponsor returned to Australia on 15 March 2018;
- on 22 December 2018 the sponsor returned again to Vietnam to stay for two months. During this visit the parties travelled together for short holidays in Singapore, Malaysia and Indonesia. They lived together in the applicant's home when they were in Vietnam. The sponsor returned to Australia on 22 February 2019;
- on 10 December 2019 the sponsor returned to Vietnam again planning to stay for two months. During this visit the parties were intending to travel together to Taiwan. However this plan was aborted as the global pandemic began to take hold in early 2020. The sponsor returned to Australia on 25 February 2020. Due to the global pandemic the sponsor has been unable to return to Vietnam for over two years. She only recently she returned to Vietnam a few weeks before the hearing.

12. The Tribunal has regard to all of the evidence before it contained in the Department and Tribunal files including but not limited to, the decision record, photographs, third party statements in support of the relationship, financial information, communication records, statements and submissions by the representative, including the written submission of 31 March 2022 as well as the oral testimonies given at the hearing.

Whether the parties are in a spouse or de facto relationship

13. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the Sponsor who is an Australian citizen.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties produced a Marriage Certificate issued in Vietnam showing the date of marriage to be 31 July 2017. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

16. The delegate considered the requirements outlined in r.1.15A of the Regulations for a spousal relationship. The Tribunal has also considered these requirements.
17. *Financial aspects of the relationship*
18. The Tribunal has considered any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses in assessing the financial aspects of the relationship.
19. The delegate notes that sponsor provided several money transfer receipts which show that a total of approximately AUD13,200 had been sent by the sponsor to the applicant from November 2016 to March 2018. In the representative's written submission of 31 March 2022, it is claimed that "much of this money was borrowed from family and friends of the Sponsor to assist her husband in his business." Money transfer receipts submitted to the Tribunal show that approximately AUD6,300 had been sent by the sponsor to the applicant from May 2018 to February 2021.
20. The Tribunal accepts the evidence that the sponsor has provided significant financial support to the applicant at times. The sponsor explained that on at least one occasion she borrow money from family and friends in order to provide to the applicant for his business. On that occasion he repaid her the money,. However given that the sponsor has been receiving employment benefits for the past 15 years and remains unemployed, the Tribunal is unsatisfied by the claimed explanation that the sponsor was able to acquire substantial sums of money for the applicant's use, by borrowing sums from family and friends on the several occasions that she has financially assisted the applicant.

21. There is no information before the Tribunal since 2021 about the financial aspects of the parties' relationship. The Tribunal acknowledges the difficulty of providing evidence of this type given that the parties live in separate countries. It is not surprising, therefore, that the parties have no joint assets or liabilities nor is there evidence of them pooling their financial resources. Nonetheless, at the time of decision the Tribunal finds that the financial aspects of the relationship do not support a finding that the parties are in a genuine and continuing relationship.

22.

23. *Nature of the household*

24. The Tribunal has considered any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework in assessing the nature of the household.

25. There is evidence that the sponsor obtained temporary household registration at applicant's home address for the period of 18 September 2016 to 18 November 2016, 20 January 2017 to 15 March 2017 and from 6 July 2017 to 6 September 2017. In response to the delegate's concern at the lack of evidence that the parties shared household responsibilities during those specified dates, it is submitted that the applicant's mother (when she was alive) did not wish the applicant to participate in any household chores whilst she was staying with the two of them. The Tribunal accepts this claim.

26. The evidence also includes hotel receipts in the joint names of the parties from their holidays in Vietnam in October 2016 and in July 2017, and during their visit to South Korea in January 2018. While the hotel receipts indicate that the applicant and his sponsor stayed at the same hotel during these specified dates, there is no evidence that the parties shared the responsibilities of the household during these holiday periods. However the Tribunal would not necessarily expect to see such evidence when parties stay in hotel accommodation.

27. The applicant's written relationship statement claims that following their marriage in July 2017, the sponsor has lived at the applicant's home in Vietnam whenever the sponsor visited Vietnam. There is evidence that the sponsor travelled to Vietnam on 28 March 2022, expecting to return to Australia on 29 April 2022. The parties both attended the hearing from the applicant's home in Vietnam. The Tribunal accepts that the sponsor has made many visits to Vietnam in order to spend time with the applicant and they have travelled together on short holidays in SE Asia. However whilst this indicates to the Tribunal that they are intimate friends and travelling companions, this does not necessarily mean that the parties are in a genuine and continuing spousal relationship.

28. The parties do not have any joint responsibility for the care and support of children. Apart from the sponsor having obtained temporary household registration at the applicant's home address, there is little independent evidence about the parties' household or their living arrangements. The Tribunal does accept that particularly since the death of the applicant's mother, the parties have been living and sharing household duties during the times of the sponsor's later visits to Vietnam. The Tribunal, however, places little weight on this aspect of their relationship as they have not been in the same country since February 2020, with the sponsor only recently returning to Vietnam some weeks before the hearing, due to the easing of travel restrictions.

29. *Social aspects of the relationship*

30. The Tribunal has considered whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities in assessing the social aspects of the relationship.

31. The evidence includes photographs of the parties' wedding ceremony and reception, as well as photographs of the parties travelling together in SE Asia. The sponsor told the Tribunal that the 270 or so wedding guests were comprised almost entirely of the applicant's friends and family. Only the sponsor's godmother attended the wedding. The sponsor said her daughter did not travel to Vietnam for the wedding as she was attending school. She said that none of her family in Vietnam attended the wedding as they were not convinced of the genuineness of the relationship, given the sponsor's previous failed four marriages. She stated that her family is slowly beginning to accept the applicant and the parties' relationship – indeed, only a few weeks prior to the hearing, she and the applicant visited her father in Vietnam.
32. The Tribunal does not accept the explanation for the sponsor's daughter not attending the wedding as a satisfactory one. However it accepts that the applicant and the sponsor have undertaken joint social activities, have been in the company of the applicant's friends and families and have travelled together. The Tribunal gives some weight to this evidence.
33. The sponsor told the Tribunal that her daughter, who is now 15 years old, has never met the applicant, other than via social media. The Tribunal finds it curious that the sponsor has never taken her daughter on any of her many visits to Vietnam to meet the sponsor in person. Her daughter may have accompanied her on at least one occasion and might have stayed with the sponsor's own family in Vietnam, without impinging upon the privacy of the parties during these visits.
34. The evidence before the Tribunal includes witness statements from the applicant's elder brother and from a long-time friend. Both declarants speak of the parties' compatibility; the applicant's elder brother also mentions the sponsor's kindness and attentiveness to her in-laws. Both spoke of their hope that the parties can be reunited in Australia and embark on a life together. The Tribunal gives positive weight to these witness statements in respect to this aspect of the relationship, however it notes that these are only two third party statements, both being from the applicant's family and friendship group.

35. *Nature of parties' commitment to each other*

36. The Tribunal has considered the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term in assessing the nature of the parties' commitment to each other.
37. It is submitted that the Tribunal have regard to fact that the parties have known each other since 2015 and have maintained their relationship despite the difficulties of time and distance. It is submitted that if the relationship was not genuine, the sponsor, being an atheist, would not have invested time in learning about the applicant's Catholic faith and agreeing to a church wedding.
38. Included in the evidence before the Tribunal were numerous transcripts of phone logs, 'screen shots' and text messages over several years as evidence of communication between the parties. The parties stated to the Tribunal that they provide each other with a degree of companionship and emotional support through their telephone and social media communication. The parties informed the Tribunal that they see this relationship as a long-term one and they continue to plan for a life together. However, almost all of this evidence was in a language other than English. As set out in the invitation to the hearing the Tribunal's Practice Directions requires documentary evidence which is in a language other than English, to be translated into English if they wish the Tribunal to place any weight on their content. Whilst the Tribunal is satisfied that these records represent a degree of companionship and emotional support the parties have drawn from each other of a long period of time, it stops short of finding that the evidence confirms that the parties share a long-term commitment to each other and to their relationship.

39. The sponsor and applicant gave evidence as to what would occur should the applicant be granted a visa to come to Australia. He would live with the sponsor and her daughter; he would strive to learn English and look for work. When the Tribunal asked each party separately whether they had discussed the possibility of the review being unsuccessful, the sponsor stated that she would not consider relocating to Vietnam to be with the applicant as her daughter's life was in Australia. When the same question was put to the applicant he replied that he preferred not to think about that possible outcome.
40. The sponsor's response suggests to the Tribunal that the parties' relationship is dependent upon applicant being permitted to come to Australia. This causes the Tribunal to question the nature of her commitment to the applicant and to their relationship. The Tribunal affords little positive weight to the evidence pertaining to this aspect of the relationship.

41.

42. *Conclusion*

43. The Tribunal has considered all of the evidence carefully. Whilst it is satisfied that the parties have a long-standing and mutually supportive, and at times, intimate relationship, the Tribunal cannot be satisfied that the parties genuinely see the relationship as a long-term, genuine spousal relationship.
44. Weighing all of the evidence before it, the Tribunal cannot be satisfied that the parties have made a mutual commitment to a shared life to the exclusion of others, or that theirs is a genuine and continuing relationship, or that it is their intention to live together on a permanent basis.
45. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made nor at the time of this decision. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.

DECISION

46. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa

Stephen Conwell
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).